Supreme Court, U.S.
FILED
SEP 6 1985

No. 85-247

In The

Supreme Court of the United States

October Term, 1985

LAWRENCE CRANBERG,
Petitioner,

vs.

CONSUMERS UNION OF UNITED STATES, INC.,
Respondent,

and

LAWRENCE CRANBERG,
Petitioner,

vs.

ASSOCIATED PRESS

and

AUSTIN AMERICAN-STATESMAN,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

RESPONDENT AUSTIN AMERICAN-STATESMAN'S BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Fifth Circuit erred in holding that the district court's finding that the statements about Petitioner published in the *Austin American-Statesman* were true was not clearly erroneous.

2. Whether Petitioner waived any complaints about the procedures used by the district court by not objecting to those procedures at the time.

3. Whether the Fifth Circuit erred in holding that the district court did not abuse its discretion in the procedure used to take evidence in the trial of the case before the court.

PARTIES TO THE PROCEEDING BELOW

Petitioner is Lawrence Cranberg.

Respondents are Cox Enterprises, Inc. d/b/a The Austin American-Statesman, and The Associated Press.

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The respondent, AUSTIN AMERICAN-STATESMAN, respectfully requests that this Court deny the petition for certiorari, seeking review of the Fifth Circuit's opinion in this case. That opinion is reported at 756 F.2d 382 (5th Cir. 1985).

STATEMENT OF THE CASE

This is a diversity case in which Petitioner alleged that he had been defamed by an article published in the April 24, 1981 edition of the *Austin American-Statesman* which was essentially a reprint of an article circulated by Associated Press the day before. The case was tried before the Honorable Fred Shannon on September 13-14, 1983, along with a companion case Petitioner had filed against Consumers Union. The court found that the statements published in the *Austin American-Statesman* that Petitioner complains of were true and entered a judgment for Respondents on October 19, 1983. The Fifth Circuit affirmed on April 1, 1985.

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STATEMENT OF THE FACTS

Judge Clark's opinion for the Fifth Circuit accurately sets out the facts.

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REASONS FOR DENYING THE WRIT

1. Petitioner waived his objections to the procedures used by the district court.

Petitioner complains that Judge Shannon conducted the trial in an unusual manner. For example, Judge Shannon required Consumers Union to go forward with proof of the truth of their article before Dr. Cranberg put on

his case and would not sustain the objections the lawyers for Respondent and the other defendants had at trial to the hearsay evidence Dr. Cranberg introduced.

It is difficult to tell what exactly Petitioner is complaining about other than the fact that the trial lasted only two days. But it is clear that Dr. Cranberg never objected to the procedures used. In fact, he agreed with them. When the court called Consumers Union's engineers as the initial witnesses, Dr. Cranberg agreed (Tr. 1-37). On the first day, Dr. Cranberg asked permission to take his expert witness out of order, which was done (Tr. 1-203). And when the trial court indicated a willingness to make a ruling at the end of the second day, Dr. Cranberg agreed that the trial court should do so (Tr. 2-271). In order to preserve any complaint about the trial proceedings, Dr. Cranberg was obligated to object at the time to afford the trial court an opportunity to decide if his action was appropriate and if not, correct the error. *See Spaulding v. University of Washington*, 740 F.2d 686, 695 (9th Cir. 1984); *Rojas v. Richardson*, 703 F.2d 186 (5th Cir. 1983).

2. The Fifth Circuit did not err in holding that the procedures used by the district court to try the case met the requirements of due process and did not constitute an abuse of discretion by the district court.

As long as the requirements of due process were met, the district court had broad discretion as to the level of his questioning of witnesses, the order that witnesses appeared, and the general method of taking evidence. *See Ruiz v. Estelle*, 679 F.2d 1115 (5th Cir. 1982), *modified*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983); *United States v. McCord*, 509 F.2d 334 (D.C. Cir.

1974) (en banc), *cert. denied*, 421 U.S. 930 (1975). And the breadth of the discretion is greater when there is a bench trial where one of the parties is pro se. *See Ruiz v. Estelle, supra.*

Here the requirements of due process were more than met. Dr. Cranberg had three months notice of the trial, he called every witness he sought to call, he cross-examined every witness called by the defendants (Tr. 2-250, Tr. 2-262, Tr. 2-224, Tr. 1-180). He was not prevented from asking any question. He took the stand himself twice (Tr. 2-132 to 2-185, Tr. 2-262 to 2-270). And every document he sought to introduce was received into evidence.

The trial was fair, efficient, and while somewhat unusual, was well within any boundary ever drawn for a federal district court in a bench trial.

3. The Fifth Circuit's conclusion that the district court's finding that the statements were true was not clearly erroneous and does not present any question as to the standard of review or other general question of law.

The essence of Dr. Cranberg's complaint about the news article that was published and circulated by Associated Press and republished without significant change was that he and Mr. Berliner did not "fight" over a tape recorder during their confrontations on April 21, 1981. The district court heard three live witnesses, two of whom, Chris Sullivan and David Berliner, said that there was a tugging match over the tape recorder and Dr. Cranberg testified that there was no such struggle. The court heard two depositions from people who said they did not see any struggle. The district court chose to believe Sullivan and

Berliner. The Fifth Circuit applied the usual "clearly erroneous" standard and correctly upheld the fact finder's finding. This Court does not and should not grant a certiorari to review evidence and discuss specific facts. *United States v. Johnson*, 268 U.S. 220, 227 (1925).

CONCLUSION

For these reasons, the petition for certiorari should be denied.

Respectfully submitted,

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